Supreme Court of the United States

OCTOBER TERM 1970

NO. 70-5039

MARGARITA FUENTES,

Appellant,

vs.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER CO.,

Appellees.

PETITION FOR REHEARING

ROBERT L. SHEVIN
Attorney General of Florida

DANIEL S. DEARING
Chief Trial Counsel

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

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PETITION FOR REHEARING

Appellee Robert L. Shevin, Attorney General of the State of Florida, petitions the Court for rehearing of the instant cause. This petition is based upon the following reasons:

I.

The decision of the majority undermines a valid state interest. The issue briefed and argued included the vital question as to whether the State of Florida has a governmental interest of sufficient validity to justify its statutory scheme of replevin. The State maintained in its brief, stressed in oral argument, and reiterates here that it has a valid interest in conserving personal property pending a judicial determination of which of two claimants has a prior right of possession. The statute presumes a right to possess the property in one party or another. It provides for state action to preclude necessity for self-help. It contemplates conserving the property, not confiscation of it. It insists that a judicial determination of the right to possession be instituted by the party bringing suit. It speaks to preservation of the property pending outcome.

The state has a responsibility and a duty to protect property of all its citizens, corporate as well as private, commercial as well as non-commercial. Moreover, it has a vital interest in protecting its economy.

The majority opinion ignores these state interests completely. It treats previous cases dealing with collection of internal revenue, the war effort, bank failure, misbranded drugs, and contaminated foods as standards by which all state interests must be measured. The State of Florida respectfully demurrs.

There are other interests which, if less dramatic, are nonetheless vital.

Protection of property, contract, and established bases for a credit-oriented economy are certainly legitimate state interests. These interests are delicately balanced. Their weights are measured by demands of the marketplace. The economy is based largely on credit purchases because that is what the marketplace requires.

Rules of the marketplace are reflected in statutes such as the Uniform Commericial Code. Chapter 675, 679, Florida Statutes. The Code describes safeguards for the consumer, but it also recognizes rights of the seller. Necessary to enforcement of those rights are remedial statutes. These include forms of action known as replevin, detinue, attachment, and garnishment. They exist in statutes of every state, though they may vary in form and effect, procedure and application. Most of these remedies provide summary procedures. In Florida, they combine summary possession with immediate judicial action: replevin, as the Court has noted, is commenced with the filing of a complaint and the posting of a bond. They are an integral part of a consumer-credit economy.

When the Court states, as the majority opinion does, that Florida's replevin statute serves no important governmental or general public interest, it discounts a major responsibility of the state.

The majority opinion raises the question of possible malicious use of replevin; a misuse of state process to harass or intentionally obstruct private enjoyment of one's property. This possibility was not covered in briefs, but is nonetheless admitted. The Court's concern on this point gives rise to two observations.

First, no citizen is immune from malicious use of process. We are all subject to suit at another's whim or caprice. Moreover, we are subject to criminal prosecution and jail at the malicious (or erroneous) instance of one who falsely (or mistakenly) swears out a warrant or names us as culprit. We are subject to such possibility for no other reason than that we are citizens of a democratic state. Without benefit of a hearing we may be temporarily deprived of liberty and property by state action at the instance of another. There is no known judicial or legislative immunization from such an occurrence. But this does not mean we should abolish arrest until after a hearing, or require prior approval of a judicial officer before civil summons issues.

Second, the number of private, as opposed to commercial, plaintiffs in replevin actions is of de minimis proportions. The overwhelming number of such actions arise out of debtor-creditor relationships or installment-purchase transactions. The same economic considerations which make prejudgment

replevin a viable remedy militate against irresponsible use of state process. Demands of the marketplace protect the credit-buyer as much as the seller.

It is respectfully submitted that when the majority opinion characterizes procedures under Florida's replevin statute as no more than "state intervention in a private dispute", it demonstrates that Appellees have failed to communicate a vital point in the course of this appeal. The extent of the state's interest reflected in its statutory scheme of replevin should be fully communicated to this Court on rehearing.

II.

The decision of the majority sweeps this case far beyond the perimeters of its facts. Mrs. Fuentes was no stranger to installment buying (A 24-26). She had made several purchases on "time" payments. While it is true that she made certain payments on her stove and stereo set, it is also true that she had not paid the full purchase price due. It was stipulated that she had failed to pay. Under express terms of the contract she signed, she was in default. It was not a complicated transaction. Mrs. Fuentes had previously entered into five such transactions with Appellee Firestone. She was not unaware of her obligation to pay for the goods she purchased.

As the Court noted, the contract Mrs. Fuentes signed provided that "in the event of default of any payment or payments, Seller at its option may take back the merchandise . . . ." There is no question that this provision was part of a printed form contract. But the remedy--repossession of merchandise for which payment is not made--can hardly be deemed to be unique. Such a seller's remedy is typical to installment sales contracts.

In Part VII of the majority opinion, the Court suggests that because the transaction was evidenced by a printed form contract between parties of unequal bargaining power, the installment buyer should not be held accountable to a contract term providing for payment as agreed or repossession of the goods. This rationale has been used to strike small-print warranty disclaimers in other so-called"contracts of adhesion" on the ground that a buyer has a right to expect the goods he buys to be free of flaws and suitable for normal use. The Uniform Commercial Code now regulates use of such disclaimers, precluding the element of surprise. But it should surprise no one that a time-payment purchaser must pay in full according to an agreed schedule for the goods he selects, contracts for, and takes home with him. To the extent that Mrs. Fuentes is representative of installment buyers generally, it must be recognized that she is on an equal bargaining basis with the installment seller whose sales contracts are shaped to meet demands of the marketplace.

It is an accepted tenet of contract law that all contracts are deemed to include applicable statutory law. Even if that were not so, it is doubtful whether a recital in the printed form expressly obligating the seller to proceed by prejudgment replevin would have benefitted Mrs. Fuentes any more than did the statement quoted above.

In any case, Mrs. Fuentes was notified by mail, by telephone, and by telegram that unless she made payments as agreed, the stove and stereo set would be repossessed. The first notification was mailed in May, 1969, a month after her last payment. Suit was not filed until September of that year. When summons was served, and the goods were replevied, the deputy sheriff was advised that Mrs. Fuentes had received legal advice. The recital of facts in Part I of the majority opinion indicates that Appellees failed to communicate the factual nature of the controversy from which the instant appeal was taken.

The Court recognizes in footnote 21 to Part V of the majority opinion that formal notice and hearing procedures would not be requisite to all actions enforcing seller's remedies; that certain instances would warrant informal practice. It is submitted that Mrs. Fuentes was given ample informal notice that unless she paid for the goods she bought, action would be taken to repossess them. She ignored the contract, the notifications, and any obligation she might have had.

Yet when suit was filed and the goods taken into custodia legis, five months after her last payment, she complained that her right to due process of law had been violated. To strike Florida's statutory scheme to provide a seller's remedy in this context is a strong indication that Appellees have failed to communicate the factual nature of this controv rsy and that a rehearing should be granted.

III.

The decision of the majority leaves installment sellers and creditors with no choice but to increase the cost of credit to consumers. As a practical result of requiring notice and a hearing, regardless of the degree of formality legislated, the peril of irresponsible treatment of purchased goods by the defaulting buyer will be increased. To this may be added higher legal fees and costs. These increased costs must be borne by those who maintain their contract commitments as well as by the few who default.

Moreover, it is submitted that the opinion of the majority will lead to more litigation added to the "progeny" of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), to the end that all pre-hearing creditor remedies such as attachment, garnishment, and detinue, enforced as statutes of the several states, will be attacked. It is respectfully submitted that these cases will overlook the fact that creditors

also have a possessory interest in property to be protected, and that statutes such as Florida's replevin scheme recognize that interest and seek to protect it by conserving the property in dispute pending adjudication of the cause. State action, rather than self-help, is important to debtor as well as creditor. To deny summary state action in this context is to increase the risk that property 'unlawfully detained' will be removed from the state or damaged.

For reason of the serious economic implications of the majority opinion, the State of Florida, through Appellee Robert L. Shevin, Attorney General, respectfully requests this Court to grant its petition for rehearing.

CERTIFICATE OF GOOD FAITH

I, Daniel S. Dearing, a member of the Bar of the Supreme Court, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for reasons of delay.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General of Florida

DANIEL S. DEARING
Chief Trial Counsel

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304

Attorney for Appellee
Robert L. Shevin